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No. 92-684

In The Supreme Court of the United States

OCTOBER TERM, 1992

THE PAYMASTER CORPORATION,

Petitioner,

v.

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented by Petitioner in its petition is not an accurate statement of any disputed issue addressed by either the District Court or the Court of Appeals below. In conformity with the decisions of other federal courts, the courts below placed the burden of proof in this Rule 60(b)(5) motion proceeding upon Respondent/movant and, after a review of the evidence presented, found Respondent to have satisfied its burden of proof.

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BRIEF IN OPPOSITION

American Bankers Insurance Company of Florida ("ABIC") submits this brief in opposition to the Petition for Writ of Certiorari.[1]

ABIC concurs in the statements of "Opinions Below," "Jurisdiction," "Statute Involved" and "Statement of the Case" contained in the Petition, except that the Petition does not appropriately characterize the opinions of the District

[1] ABIC is a wholly-owned subsidiary of American Bankers Insurance Group, Inc., which is a publicly owned company. ABIC has no subsidiaries that are subject to disclosure under Supreme Court Rule 29.1.

Court and the Court of Appeals. ABIC submits the following additional description of the proceedings in the courts below.

STATEMENT OF THE CASE

District Court Opinion

After judgment was entered and Paymaster entered into a settlement with one of the judgment debtors, with which ABIC had been held to be jointly liable for certain amounts, ABIC filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(5). The purpose of the motion was to determine the impact of the settlement on the outstanding judgment against ABIC.

After receiving and reviewing written memoranda from ABIC and Paymaster that included testimony in the form of declarations and documentary exhibits, the District Court Judge, the Honorable Stephen Wilson, held a hearing on the Rule 60 motion at which the court pointedly pressed counsel for both Paymaster and ABIC on their interpretation of the relevant documents, the motivations of the settling parties, discussions and negotiations between counsel relating to the settlement issues and related matters. The District Court found that the disposition of ABIC's Rule 60(b)(5) motion depended upon an interpretation of four documents that contained the terms of Paymaster's partial settlement of the litigation.[2] Pet. App. 30. Paymaster has never disputed the correctness of this conclusion. The District Court determined that it was necessary and appropriate to consider extrinsic evidence in interpreting those documents, and it therefore considered extrinsic evidence submitted for that purpose by both Paymaster and ABIC. Pet. App. 30-35. Paymaster has

[2] The opinions of the courts below are accurately reproduced in the Appendix to the Petition. ABIC will cite to those opinions as "Pet. App."

never contended that the District Court should not have considered the extrinsic evidence.[3]

After due consideration of all of the evidence, the District Court agreed with the position advocated by ABIC, finding that two separate satisfactions had occurred, and that ABIC was entitled to a partial satisfaction of its compensatory damages in the amount of $1.7 million, and a partial satisfaction of its punitive damages in the amount of $1.7 million. Pet. App. 35. The court rejected the conflicting position that Paymaster had advocated. There is no evidence in the transcript of the hearing on the Rule 60 motion or in the District Court's opinion that it used a "no burden of proof" standard or that it did not consider all of the evidence and argument presented to it. The District Court was simply convinced on the merits that ABIC's interpretation of the evidence was the appropriate interpretation.

Court of Appeals Opinion

The Court of Appeals for the Ninth Circuit reviewed the District Court's decision utilizing the appropriate standards of review. Pet. App. 5-6. The Court of Appeals essentially gave Paymaster another attempt at the merits by reviewing the District Court's decision on the interpretation of the settlement documents on a *de novo* basis. Both Paymaster and ABIC argued the appropriateness of the District Court's interpretation of the settlement documents in their briefs. No assertion was made in any of the briefs submitted to the Court of Appeals that the District Court had utilized an inappropriate standard of review or burden of proof. The Court of Appeals affirmed, finding that the District Court had not committed error, and that ABIC's interpretation of the settlement documents was correct. Pet. App. 10, 12.

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[3] As will be seen, Paymaster vigorously argued all of the extrinsic evidence to the District Court, and to the Court of Appeals in a *de novo* posture.

Contrary to the position asserted in the Petition, the Court of Appeals did not find that Paymaster would prevail if the burden of proof on the Rule 60 motion was placed upon ABIC, nor did it hold that the motion should be considered as if no party had the burden of proof. Paymaster's argument to the contrary is based upon taking a single footnote from the opinion of the Court of Appeals out of context, and giving it improper weight. In fact, the Court of Appeals implicitly acknowledged that ABIC, as the moving party, had the burden of proof and, after a careful analysis of the District Court opinion and a *de novo* review of the evidence underlying that opinion, concluded that ABIC met its burden of proof.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS APPLIED A BURDEN OF PROOF RULE WHICH IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

A. The Ninth Circuit Placed the Burden of Proof Upon Respondent.

The decision of the Court of Appeals is consistent with, rather than in conflict with, opinions of other Courts of Appeal relating to Rule 60 motions. Paymaster argues simply that the burden of proof was upon ABIC to prove its entitlement to the relief sought in its Rule 60 motion. For purposes of this Brief in Opposition to the Petition for Writ of Certiorari, ABIC does not contest that it bore the burden to prove, by a preponderance of the evidence, that it was entitled to the relief sought in the Rule 60 motion.[4] The courts below agreed with that burden of proof rule, and implicitly placed the burden of proof upon ABIC, the moving party. This burden of proof rule is in conformity with the rule used by other Circuit Courts for motions under Rule 60(b)(5) based upon partial settlements and satisfactions of judgment.

ABIC has satisfied that burden, not once, but twice. It is clear that neither the District Court nor the Court of Appeals utilized a "no burden of proof" standard in evaluating ABIC's Rule 60 motion. It is clear from the opinions of both courts that they were convinced by ABIC's arguments, and were not convinced by Paymaster's arguments. Both courts below accepted detailed evidence, arguments of fact and arguments of law on the issues, and concluded that ABIC's interpretation of the settlement documents was more persuasive than Paymaster's interpretation. Both the District Court and the Court of

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[4] ABIC does not contest the question of who should have borne the burden of proof, because the Ninth Circuit placed the burden upon ABIC and found ABIC to have met its burden. (*See, 6-9, 12-13 infra.*)

Appeals clearly determined that ABIC had demonstrated that it was entitled to credit against the outstanding judgment in the amounts that it sought. ABIC met its burden of proof, and there is no conflict between the decisions below and decisions of other Circuits.

B. The Ninth Circuit Did Not Adopt A "No Burden Of Proof" Rule.

The premise of Paymaster's argument is that in affirming the lower court judgment, the Ninth Circuit "creat[ed] an unprecedented burden of proof rule for a Rule 60(b) motion . . . [by] declin[ing] to hold that ABIC had the burden of proof on its Rule 60(b) motion, and instead rul[ing] that the settlement documents should be interpreted as though *neither* party ha[s] the burden of proof." Paymaster's Petition at 7-8. This recitation misstates Judge Nelson's opinion. Contrary to Paymaster's assertion, the Ninth Circuit affirmatively noted that ABIC, as movant under Rule 60(b)(5), had the burden of proof. Pet. App. 7, n. 2. The very footnote that purportedly forms the basis of petitioner's claim belies the existence of a legitimate argument. That the Ninth Circuit assigned the burden of proof to ABIC is clear as the Court in footnote 2 states:

> In this case, . . . [simply ruling against whatever party has the burden of proof] would result in a ruling for Paymaster, since American chose to file this motion to determine its rights. . . . The meaning of a contract should not depend on who instituted the litigation.

Id.

This footnote also reflects the view of the Ninth Circuit that where extrinsic evidence that helps to illuminate the meaning of a contract is available, a court should base its interpretation of the contract, if possible, on a careful consider-

ation of the available evidence and the pertinent legal issues, rather than on a finding of which party has the burden of proof, which itself does not provide any evidence of the intention of the parties. This view is hardly revolutionary, nor is it in conflict with the opinions of any other Circuit.

Petitioner's suggestion that the Court adopted a "no burden of proof" rule defies judicial practice and results from a tortured reading of the footnote at issue. *Id.* The conclusion is drawn mistakenly from the fact that the Ninth Circuit rejected a contract interpretation practice of the Sixth Circuit adopted in *United Steelworkers v. North Bend Terminal Co.*, 752 F.2d 256 (6th Cir. 1984). In that case, the Court was called upon to review a lower court's determination of an employer's obligation to continue funding a pension plan after it closed the facility that the plan covered. The issue arose and was decided in the context of cross motions for summary judgment. The Circuit Court noted that the documentary evidence, the collective bargaining agreement and the plan, were ambiguous or supported the employer's position and that the issue was not discussed in contract negotiations between the parties. Concluding that it was presented with a case of "mutual misunderstanding", the court rejected the solutions of finding no contract to exist or supplying contractual terms to resolve the question. Instead, the court held that "where there is a mutual misunderstanding as to a contract term and the options [of voiding the contract or supplying terms] are not open to the court, the court will rule against the party bearing the burden of proof." *Id.* at 261. Because plaintiffs held the burden of proving its allegations of breach of a collective bargaining agreement, the court held for defendants. *Id.*

United Steelworkers is inapposite to the issue before this Court, and in any event, the Ninth Circuit's rejection of its approach did not result in adopting a "no burden of proof" rule under Fed. R. Civ. P. 60(b)(5). *United Steelworkers* does not adopt or apply a burden of proof rule in Rule 60(b)(5)

matters; it does not even involve such a motion. The Sixth Circuit opinion only suggests a rule of contract interpretation in the limited situation of mutual misunderstanding and where a court is unable or unwilling to reach a reasoned determination of interpretation based upon all available evidence. The Paymaster/ABIC settlement presents a different situation. Absent is a mutual misunderstanding; absent is a failure of both parties to address the issue in negotiations. The instant case presents a situation where two courts have found the underlying written contracts and extrinsic evidence relevant to explain the terms of the contracts, to demonstrate an understanding that the parties intended there to be two separate satisfactions and a credit to ABIC of $1.7 million against the punitive damages judgment and a credit to ABIC of $1.7 million against the compensatory damages judgment.

In rejecting *United Steelworkers*, the Ninth Circuit rejected a doctrine of judicial abdication.[5] The Ninth Circuit declined to resolve a contractual interpretation problem "by *simply* ruling against whatever party has the burden of proof".

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[5] Paymaster argued to the Court of Appeals that interpretation of the settlement documents was governed by California law.

> Under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938), California law applies to the interpretation of the settlement documents .... Accordingly, the parties cited and the district court applied California law in connection with ABIC's Motion. Further, two of the four settlement documents provide that they are to be construed in accordance with California law.

Paymaster's Initial Brief to the Ninth Circuit at 6, n. 1. The Court of Appeals agreed, and cited controlling California Supreme Court, court of appeals, Ninth Circuit opinions and statutes that require the consideration of extrinsic evidence in the interpretation of written documents. Pet. App. 6-10. Allowing the burden of proof to be decisive here, irrespective of what the extrinsic evidence that was available showed, would have violated applicable California law. The Ninth Circuit appropriately declined to take that route, at least in part due to the requirements of California law that Paymaster itself had urged upon that court. The District Court also appropriately followed California law in this area. Pet. App. 30-31.

Pet. App. 7, n. 2 [emphasis added]. The Court declined to adopt an artificial rule that the meaning of a contract depends upon who instituted the litigation. *Id.* Rather, the Court deemed it judicious to review the available evidence and arrive at a reasoned determination on the merits. In rejecting *United Steelworkers*, the Ninth Circuit did not dispose of or shift the burden of proof it acknowledged fell on ABIC, rather it undertook the task of determining whether ABIC met its burden.

II. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS REVIEWED ALL AVAILABLE EVIDENCE ON A *DE NOVO* BASIS, AND BOTH COURTS INDEPENDENTLY CONCLUDED THAT ABIC'S POSITION WAS CORRECT.

There is no dispute that both the District Court and the Court of Appeals received and actively considered a wide variety of evidence and argument relating to the Rule 60 motion, and that both courts were persuaded by ABIC's presentation on the issues raised by the motion.[6]

A. The District Court Placed The Burden Of Proof Upon ABIC, And Determined That ABIC Had Met Its Burden Of Proof.

In considering the Rule 60 motion, the District Court had a fully developed record. ABIC submitted a memorandum of law in support of its Rule 60 motion that included five documents as exhibits. Paymaster submitted an extensive memorandum of law in opposition to the motion with twenty-three documents as exhibits. ABIC submitted a reply memorandum of law that included seven documents as attachments. Both

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[6] Paymaster actively encouraged both courts below to consider all pertinent extrinsic evidence, as was appropriate under California law, rather than rule based solely upon the settlement documents and the applicable burden of proof.

Paymaster and ABIC submitted sworn declarations in support of their positions.

The District Court held a hearing on the motion to receive further argument of counsel. The 50 page transcript of the hearing on the Rule 60 motion held by the District Court shows a very active judge, who had reviewed the written submittals in detail prior to the hearing and who had a series of blunt questions for counsel for both Paymaster and ABIC that the court pursued vigorously to develop the record and enable the court to make its decision.

Judge Wilson never stated, or even implied, either during the hearing or in his subsequent written opinion, that a "no burden of proof" standard was appropriate. Indeed, it is perfectly evident from the transcript of the hearing that Judge Wilson was closely reviewing all of the available evidence and the arguments and interpretation of the evidence offered by both ABIC and Paymaster in an attempt to arrive at the "proper" interpretation of the settlement documents. The District Court's written opinion sets out the arguments and interpretation of the evidence offered by Paymaster and by ABIC, discusses the evidence and applicable principles of law and states a conclusion. Paymaster never claimed in its briefs to the Court of Appeals that the District Court applied an incorrect burden of proof or inappropriately disregarded any of the evidence or legal principles submitted by Paymaster.[7]

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[7] Paymaster did argue that it should have been permitted to present live testimony at the District Court's hearing, but both the District Court and the Ninth Circuit found that it was within the discretion of the District Court not to take live testimony when it was admitted by counsel for Paymaster that the proposed live testimony would merely duplicate what was in the sworn declarations that had been submitted to the court. The principal live witnesses would have been the two lawyers who made the argument to the District Court, and whom the District Court questioned closely at the hearing on the pertinent evidence, factual and legal issues. Paymaster has not pursued that issue here.

It is evident from the District Court's opinion that it considered all of the factual evidence, principles of law and arguments of counsel and arrived at a decision as to how the settlement documents should be interpreted and the impact of that interpretation on the outstanding judgment against ABIC.[8] The District Court's opinion on the Rule 60 motion shows the court considering conflicting inferences and interpretations of various documents and sworn statements. Although the opinion does not explicitly state which party bore the burden of proof on the motion,[9] it is clear from the decision that the District Court was affirmatively persuaded that sufficient evidence had been presented which supported ABIC's position on several critical issues.

For example, Paymaster argued that the settlement payments were in fact made through ABIC, rather than directly by the settling co-defendants to Paymaster. The District Court found that "the agreements do not support" that contention.[10] The allocation of the payments by the settling defendants to a reduction of compensatory damages, as argued by ABIC, was also accepted by the District Court.[11] Finally, the District Court expressly found that ABIC's application of the "single satisfaction rule" of California law was correct, rejecting Paymaster's position on that issue.[12] The District Court implicitly held that ABIC met its burden of proof.

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[8] Pet. App. 24-35.

[9] There is no principle of law that required the District Court to state the burden of proof rule it was using, and Paymaster has never argued that the failure of the District Court to make such a statement was error.

[10] ABIC argued that the settlement payments went directly from the settling defendants to Paymaster. The District Court agreed. Pet. App. 34.

[11] "ABIC is also correct that, given the source of the payments, Paymaster could not have constructed the agreement in such a way that the payments would have paid off anything but the compensatory damages." Pet. App. 34.

[12] Pet. App. 35.

B. The Ninth Circuit Determined That ABIC Met Its Burden Of Proof.

Probably the most compelling evidence that the Ninth Circuit did *not* adopt the "no burden of proof" rule suggested by petitioner is the detailed review of evidence and analysis that the Court undertook before reaching a determination. After its position was rejected by the District Court, Paymaster attempted to convince the Ninth Circuit that its position on the merits of the Rule 60 motion should be adopted. To that end, Paymaster submitted a 325 page appendix of record excerpts to the Ninth Circuit that included eight sworn declarations of seven different persons, portions of the District Court record, portions of the transcript of the hearing held by the District Court on the Rule 60 motion, settlement documents, correspondence and other material. ABIC submitted additional record excerpts, and both parties submitted written briefs and oral argument. The Ninth Circuit issued an opinion that reviewed the available evidence in detail, but which agreed with the result reached by the District Court. Thus, a second court was persuaded by ABIC's position on the Rule 60 motion.

The Ninth Circuit opinion demonstrates a sifting of the evidence and arguments and a conclusion that the evidence supported the position of ABIC. The Court first noted reliance upon the language of three contracts — the Settlement Agreement between United and Paymaster, the Settlement Agreement and Mutual Release between United and ABIC and a November 11 letter from Paymaster to ABIC. Pet. App. 6. The Court also considered the declarations submitted by the parties and other evidence. Pet. App. 6-9.

The Court recognized the single satisfaction rule, and noted that ABIC's liability would be reduced by $1.7 million as a matter of law. Pet. App. 7. The Court concluded that it would be redundant and therefore lacking merit to interpret the settlement, as Paymaster claims, as doing no more than reconfirming this operation of law. *Id.* Thus, the Ninth Circuit

searched the contracts for a demonstrable intent that the settlement between the parties was intended to be so redundant and thus limited to a single satisfaction. No indication of such an intent or an intent to substitute a single credit against punitive damages for a single credit against compensatory damages could be found. Pet. App. 8. However, the Ninth Circuit did not limit its review of the evidence to the contracts. It examined extrinsic evidence in the form of the declarations submitted by the parties to help explain what the contracts meant. Pet. App. 9. Evidentiary support for two separate satisfactions was found in the change in language of the November 11 letter Paymaster sent to ABIC. *Id.*

After this exhaustive review of the evidence, the Ninth Circuit held that "the documents support the conclusion that the $1.7 million satisfaction of punitive damages was separate from and independent of the satisfaction of compensatory damages." Pet. App. 10. Implicit in this holding is a conclusion that ABIC met its Rule 60(b)(5) burden of proving that it should be relieved of those portions of the final judgment against it to the extent of a partial satisfaction of the punitive damage award in the amount of $1.7 million and a partial satisfaction of the compensatory damage award in the amount of $1.7 million.

III. ALLEGEDLY DISPARATE BURDENS OF PROOF UNDER VARIOUS SUBPARTS OF RULE 60 OR ELSEWHERE ARE NOT AT ISSUE IN THIS CASE.

In section III of the Petition, Paymaster argues that this Court should "clarify that the subparts of Rule 60(b)(5) are not subject to disparate burdens of proof." Pet. 11. While there may be different standards of proof utilized by the courts for different factual situations under Rule 60(b)(5), such differences have nothing to do with the facts of this case, and do not appropriately present a basis for review by this Court.

It is clear that Rule 60(b)(5) applies to at least two different classes of cases, ones like the case at bar, that involve partial satisfactions of monetary judgments and others that involve requests to modify consent decrees and other nonmonetary judgments that have prospective application. There is only one "subpart" of Rule 60(b)(5) at issue in this case, however, and Paymaster's attempt to create "conflicting" standards under different parts of the Rule is a distinction without meaning, and is not helpful in determining whether the proper burden of proof was utilized in the case at bar.

The courts below imposed upon ABIC, as the moving party for modification of a monetary judgment based upon a partial satisfaction, pursuant to Rule 60(b)(5), the burden to establish grounds for modification of or relief from the judgment. ABIC satisfied that burden here, and as set forth above, the Ninth Circuit did not purport to establish a "no burden of proof" standard. There is no conflict with this Court's decision in *Rufo v. Inmates of Suffolk Jail*, 502 U.S. ___, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) on this point.

The different *level* of proof that has been required under different provisions of Rule 60 and in different factual situations is not relevant here. For example, many courts, including this Court in *Rufo*, have repeatedly required a heightened level of proof for prospective relief from a non-monetary damage provision contained in a consent decree, yet that fact is simply not pertinent here, since no court has applied, nor do either Paymaster or ABIC seek to apply, that heightened standard to Rule 60(b)(5) motions based upon partial satisfactions of monetary judgments.[13] Likewise, the holdings on the level of proof required in situations that do not even involve Rule 60 motions cited by Paymaster are totally irrelevant here. *Grogan*

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[13] This Court articulated in *Rufo* why a heightened standard was appropriate for relief from consent decrees regarding prison overcrowding. Clearly, none of those factors apply to determining the effect of a partial settlement and satisfaction on an outstanding monetary judgment.

v. Garner, 498 U.S. __, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (burden of proof under 11 U.S.C. §523); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (level of proof for common law fraud claims and claims under §10(b) of the Securities Exchange Act of 1934).

The level of proof required for relief pursuant to Rule 60(b)(5) based upon a partial satisfaction is a simple preponderance of the evidence. Paymaster has not suggested otherwise or presented any authority to indicate that the level of proof required is anything other than a preponderance. There is no need for this Court to "clarify" anything relating to allegedly disparate burdens of proof under Rule 60(b)(5), since there are no such disputes at issue here.

CONCLUSION

The Court of Appeals did not utilize a "no burden of proof" rule. Both the District Court and the Court of Appeals evaluated all of the evidence, factual arguments and legal arguments, and both courts independently determined that the position advanced by ABIC was supported by a preponderance of the evidence. Both courts below found the position advanced by Paymaster to be unsupported by the evidence. Both courts below therefore found that ABIC had sustained a burden to prove the correctness of its position. There is no conflict between the decisions below and the opinions of any Circuit Court. The Petition does not fulfill any of the categories set forth in Supreme Court Rule 10 governing review on writ of certiorari, and the Petition should therefore be denied.

Respectfully submitted,

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